

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHERRIE LYNN BAKER,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of Social Security,¹

Defendant.

)
) CASE NO. C12-1278-JLR-MAT

)
) REPORT AND RECOMMENDATION

Plaintiff appeals the final decision of the Commissioner of the Social Security Administration (“Commissioner”) which denied her application for Social Security Income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C. § 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below, the Commissioner’s decision is REVERSED and REMANDED for further administrative proceedings.

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¹ On February 14, 2013, Carolyn W. Colvin became the Acting Commissioner of Social Security. Therefore, pursuant to Rule 25(d)(1) of the Federal Rules of Civil Procedure, Carolyn W. Colvin is substituted for Commissioner Michael J. Astrue as the defendant in this suit. **The Clerk is directed to update the docket accordingly, and the parties are ordered to update the caption on all future filings with the court.**

01 I. FACTS AND PROCEDURAL HISTORY

02 Plaintiff was born in 1986 and was 22 years old on the date her application was filed.
03 (Administrative Record (“AR”) 140.) She has a high school education and previously worked
04 as a telemarketer and sales clerk. (AR 21.) On March 26, 2009, she filed an application for
05 SSI, alleging disability beginning August 1, 2008. (AR 12, 140-47.)

06 The Commissioner denied plaintiff’s applications initially and on reconsideration.
07 (AR 84-87, 90-92.) She requested a hearing which took place on May 17, 2010. (AR 33-78.)
08 On June 11, 2010, the ALJ issued a decision finding plaintiff not disabled. (AR 12-22.) The
09 Appeals Council denied plaintiff’s request for review (AR 1-5), making the ALJ’s ruling the
10 “final decision” of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On July
11 26, 2012, plaintiff timely filed the present action challenging the Commissioner’s decision.
12 (Dkt. No. 1.)

13 II. JURISDICTION

14 Jurisdiction to review the Commissioner’s decision exists pursuant to 42 U.S.C. §§
15 405(g) and 1383(c)(3).

16 III. DISCUSSION

17 The Commissioner follows a five-step sequential evaluation process for determining
18 whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920. At step one, it must be
19 determined whether the claimant has engaged in substantial gainful activity. The ALJ found
20 plaintiff had not engaged in substantial gainful activity since the application date. (AR 14.)
21 At step two, it must be determined whether the claimant suffers from a severe impairment.
22 The ALJ found plaintiff’s depression, recurrent; acute stress disorder; posttraumatic stress

01 disorder (“PTSD”); drug and alcohol abuse; obesity; and asthma severe. *Id.* Step three asks
02 whether the claimant’s impairments meet or equal the criteria of a listed impairment. The ALJ
03 found plaintiff’s impairments did not meet or equal the criteria of a listed impairment. (AR
04 15.) If the claimant’s impairments do not meet or equal a listing, the Commissioner must
05 assess residual functional capacity (“RFC”) and determine at step four whether the claimant has
06 demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to
07 perform

08 less than a full range of medium work. This individual can lift up to 50 lbs.
09 occasionally, and lift and/or carry 25 lbs. frequently, with no restrictions for
10 standing, walking, and sitting with normal breaks. This individual can do
11 unlimited pushing and pulling except for the lift and/or carry limitation stated
12 above. She should avoid concentrated exposure to fumes, odors and gases.
13 This individual can perform simple, routine tasks and follow short, simple
14 instructions. This individual can do work that needs little or no judgment and
15 can perform simple duties that can be learned on the job in a short period. This
16 individual has average ability to perform sustained work activities (i.e. can
17 maintain attention and concentration, persistence and pace) in an ordinary work
18 setting on a regular and continuing basis (i.e., 8 hours a day, for 5 days a week,
or an equivalent work schedule) within customary tolerances of employers’
rules regarding sick leave and absence. This individual can have occasional
interactions with co-workers and supervisors and can work in close proximity to
co-workers but not in a cooperative or team effort. This individual can respond
appropriately to supervision, co-workers and work situations, and can deal with
occasional work setting changes. This individual will not deal with the general
public as in a sales position or where the general public is frequently
encountered as an essential element of the work process. Incidental contact
with the general public is not precluded.

19 (AR 17.) With that assessment, the ALJ found plaintiff unable to perform any past relevant
20 work. (AR 21.)

21 If the claimant is able to perform her past relevant work, she is not disabled; if the
22 opposite is true, then the burden shifts to the Commissioner at step five to show that the

01 claimant can perform other work that exists in significant numbers in the national economy,
02 taking into consideration the claimant's RFC, age, education, and work experience. Based on
03 the testimony of a vocational expert, the ALJ found there are jobs that exist in significant
04 numbers in the national economy that plaintiff can perform. (AR 21.) The ALJ concluded
05 plaintiff has not been under a disability since the date the application was filed. (AR 22.)

06 Plaintiff argues that the ALJ failed to properly consider the opinions of Kees C.
07 Hofman, Ph.D., Jeffrey Nelson, M.D., and the state agency consultants; failed to properly
08 consider all of the severe mental impairments, failed to properly consider whether her
09 impairments met or equaled a listing, and failed to properly assess her mental RFC and
10 credibility. (Dkt. No. 16.) She requests remand for an award of benefits or, in the alternative,
11 further administrative proceedings. *Id.* The Commissioner argues the ALJ's decision is
12 supported by substantial evidence and should be affirmed. (Dkt. No. 20.)

13 Medical Opinion Evidence

14 As a matter of law, more weight is given to a treating physician's opinion than to that of
15 a non-treating physician because a treating physician "is employed to cure and has a greater
16 opportunity to know and observe the patient as an individual." *Magallanes v. Bowen*, 881 F.2d
17 747, 751 (9th Cir. 1989); *see also Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). A treating
18 physician's opinion, however, is not necessarily conclusive as to either a physical condition or
19 the ultimate issue of disability, and can be rejected, whether or not that opinion is contradicted.
20 *Magallanes*, 881 F.2d at 751. If an ALJ rejects the opinion of a treating physician, the ALJ
21 must give clear and convincing reasons for doing so if the opinion is not contradicted by other
22 evidence, and specific and legitimate reasons if it is. *Reddick v. Chater*, 157 F.3d 715, 725 (9th

01 Cir. 1988). “This can be done by setting out a detailed and thorough summary of the facts and
02 conflicting clinical evidence, stating his interpretation thereof, and making findings.” *Id.*
03 (citing *Magallanes*, 881 F.2d at 751). The ALJ must do more than merely state his
04 conclusions. “He must set forth his own interpretations and explain why they, rather than the
05 doctors’, are correct.” *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 421–22 (9th Cir. 1988)).
06 Such conclusions must at all times be supported by substantial evidence. *Id.*

07 The opinions of examining physicians are to be given more weight than non-examining
08 physicians. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996). Like treating physicians, the
09 uncontradicted opinions of examining physicians may not be rejected without clear and
10 convincing evidence. *Id.* An ALJ may reject the controverted opinions of an examining
11 physician only by providing specific and legitimate reasons that are supported by the record.
12 *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).

13 Opinions from non-examining medical sources are to be given less weight than treating
14 or examining doctors. *Lester*, 81 F.3d at 831. However, an ALJ must always evaluate the
15 opinions from such sources and may not simply ignore them. In other words, an ALJ must
16 evaluate the opinion of a non-examining source and explain the weight given to it. SSR
17 96–6p. Although an ALJ generally gives more weight to an examining doctor’s opinion than
18 to a non-examining doctor’s opinion, a non-examining doctor’s opinion may nonetheless
19 constitute substantial evidence if it is consistent with other independent evidence in the record.
20 *Thomas v. Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002); *Orn*, 495 F.3d at 632–33.

21 Plaintiff argues that the ALJ failed to give legally sufficient reasons for disregarding the
22 opinions of examining psychologist Kees C. Hofman, Ph.D., and treating psychiatrist Jeffrey

01 Nelson, M.D. Plaintiff also contends the ALJ erred in giving greater weight to the opinions of
02 the non-examining state agency medical consultants than to the opinions of the examining and
03 treating doctors. (Dkt. No. 16 at 5-18.)

04 A. Kees C. Hofman, Ph.D.

05 On October 25, 2008, examining psychologist Kees C. Hofman, Ph.D., performed a
06 psychological evaluation of the plaintiff for the Washington State Department of Social and
07 Health Services (“DSHS”). (AR 409-14.) Dr. Hofman found plaintiff had no limitations in
08 any of the five cognitive factors evaluated, but opined that plaintiff had marked to severe
09 limitations in several social factors, including her ability to relate appropriately to coworkers
10 and supervisors, to interact appropriately in public contacts, to respond appropriately to and
11 tolerate the pressures and expectations of her normal work setting, and to control physical or
12 motor movements and maintain appropriate behavior. (AR 411.) As the basis for this
13 opinion, Dr. Hofman noted plaintiff easily takes offense, struggles with impulses to harm
14 herself, and is unable to maintain employment. *Id.* Dr. Hofman diagnosed plaintiff with
15 acute stress disorder, PTSD, and depression, recurrent, noting that her score on the Beck
16 Depression Inventory was in the severe range. (AR 410, 412.) Dr. Hofman also noted that
17 mental health treatment would likely restore or substantially improve plaintiff’s ability to work,
18 but that she was not currently receiving mental health services. (AR 412.) Dr. Hofman
19 indicated that plaintiff would be impaired to the degree indicated for a minimum of one year,
20 and that she has “difficulty accessing treating.” *Id.*

21 The ALJ found Dr. Hofman’s opinions should be given “some weight, but only to the
22 extent consistent with the medical record.” (AR 18.) The ALJ noted that Dr. Hofman

01 indicated plaintiff was “unable to maintain employment,” but discounted this opinion asserting
02 that Dr. Hofman “also wrote that the claimant was not cooperating with treatment plan, and that
03 treatment would ‘likely to restore or substantially improve’ her ability to work for pay in a
04 regular and predictable manner.” *Id.* The ALJ’s RFC assessment limited plaintiff to
05 incidental contact with the general public. (AR 17.) However, the ALJ disregarded Dr.
06 Hofman’s other social limitations, finding that plaintiff can respond appropriately to
07 supervision and co-workers, and can work in close proximity to coworkers, as long as she does
08 not have to work in cooperation with them. *Id.* The ALJ included no limitations in plaintiff’s
09 ability to control physical or motor movements and maintain appropriate behavior.

10 Plaintiff argues that the ALJ erred by failing to either incorporate the limitations found
11 by Dr. Hofman into the RFC assessment, or give legally sufficient reasons for rejecting Dr.
12 Hofman’s opinions. (Dkt. No. 16 at 7.) Plaintiff contends that although the ALJ indicated
13 that he did not believe Dr. Hofman’s opinion was consistent with other medical evidence of
14 record, the ALJ did not actually identify any specific evidence that contradicted Dr. Hofman’s
15 opinions. Plaintiff also argues that although the ALJ asserted that Dr. Hofman wrote plaintiff
16 was not cooperating with a treatment plan, Dr. Hofman never made that statement. Rather, Dr.
17 Hofman indicated that plaintiff was not eligible to receive treatment from his agency, and that
18 plaintiff was not “currently” receiving mental health services. (Dkt. No. 16 at 8 (citing AR at
19 412).)

20 The Court agrees with plaintiff that the ALJ erred by failing to give legally sufficient
21 reasons for rejecting Dr. Hofman’s opinion. Although the ALJ apparently believed Dr.
22 Hofman’s opinions were inconsistent with the medical record, he failed to identify any specific

01 evidence that contradicted Dr. Hofman's opinions. As indicated above, when an ALJ seeks to
02 discredit a medical opinion, he must explain why his own interpretations, rather than those of
03 the doctor, are correct. *See, e.g., Reddick*, 157 F.3d at 725. "[C]onclusory reasons will not
04 justify an ALJ's rejection of a medical opinion." *Regennitter v. Soc. Sec. Comm'r*, 166 F.3d
05 1294, 1299 (9th Cir. 1999).

06 The Commissioner argues that "the RFC assessment reflects Dr. Hofman's limitations
07 when viewed in light of Plaintiff's activities of daily living and other medical evidence, which
08 were also relied upon by the ALJ." (Dkt. No. 20 at 12-14.) The Commissioner then identifies
09 conflicting activities and medical opinions from the state agency consultants, Leslie Postovoit,
10 Ph.D., and William Lysak, Ph.D. The problem with this argument, however, is that the ALJ
11 did not provide these reasons. The Court reviews the ALJ's decision "based on the reasoning
12 and findings offered by the ALJ—not post hoc rationalizations that attempt to intuit what the
13 adjudicator may have been thinking." *Bray v. Comm'r of SSA*, 554 F.3d 1219, 1225 (9th Cir.
14 1995). As pointed out by plaintiff, the ALJ did not reject Dr. Hofman's opinion on the basis
15 that it was contradicted by plaintiff's daily activities and the opinions of Drs. Postovoit and
16 Lysak. As such, neither can this Court.

17 The Commissioner further argues that the ALJ properly rejected Dr. Hofman's opinion
18 that plaintiff was "unable to maintain employment," because plaintiff was not taking
19 psychiatric medication or in mental health treatment at the time she saw Dr. Hofman – and Dr.
20 Hofman indicated that mental health treatment would likely restore or substantially improve
21 plaintiff's ability to work. (Dkt. No. 20 at 13 (citing 20 C.F.R. § 416.930(a) (stating that a
22 claimant must follow prescribed treatment if treatment will restore the claimant's ability to

01 work).) The Commissioner contends that the ALJ thus reasonably inferred that plaintiff was
02 not cooperating with a treatment plan. *Id.* at 13-14.

03 Again, plaintiff argues, correctly, that these are post hoc rationales which the ALJ
04 himself did not provide as reasons for not adopting the limitations found by Dr. Hofman. *See*
05 *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001) (“[W]e cannot affirm the decision of an
06 agency on a ground that the agency did not invoke in making its decision.”). Furthermore,
07 contrary to the Commissioner’s assertion, the ALJ did not reasonably infer that plaintiff was not
08 cooperating with a treatment plan. Rather, the ALJ incorrectly stated that Dr. Hofman “*wrote*
09 that the [plaintiff] was not cooperating with treatment plan.” (AR 18 (emphasis added).) Dr.
10 Hofman, however, never made that statement. Rather, Dr. Hofman stated that plaintiff was not
11 eligible to receive treatment from his agency, and that she was not “currently receiving mental
12 health services,” but “wants [treatment].” (AR at 412.) The Commissioner’s argument that
13 plaintiff was not compliant with a mental health treatment plan is not supported by the record as
14 there was no mental health treatment plan in place at the time plaintiff saw Dr. Hofman. In
15 sum, the ALJ’s evaluation of Dr. Hofman’s evaluation is not supported by substantial evidence
16 and is erroneous.

17 B. Jeffrey Nelson, M.D.

18 On May 5, 2010, treating psychiatrist Jeffrey Nelson, M.D., opined in written
19 interrogatory questions prepared by plaintiff’s attorney that plaintiff’s impairments met the
20 criteria for Listing 12.06 (anxiety-related disorders) and Listing 12.04 (affective disorders).
21 (AR 485-90.) Specifically, Dr. Nelson check marked boxes indicating that plaintiff had
22 marked restriction of activities of daily living; marked difficulties maintaining social

01 functioning; and marked deficiencies of concentration, persistence or pace. (AR 486, 489.)
02 Dr. Nelson noted that he based his conclusions on “[h]istory, mental status exam and
03 observation.” (AR 487, 490.) In addition, Dr. Nelson opined that plaintiff’s ADHD caused
04 marked inattention; marked impairment in age-appropriate cognitive-communicative
05 functioning; and marked deficiencies in concentration, persistence, or pace resulting in frequent
06 failure to complete tasks in a timely manner. (AR 491.)

07 The ALJ considered Dr. Nelson’s opinions but assigned them little weight for several
08 reasons. (AR 19.) First, the ALJ found plaintiff’s “own testimony and reported [activities of
09 daily living] do not support Dr. Nelson’s assessment.” *Id.* Although Dr. Nelson opined that
10 plaintiff had marked restrictions in activities of daily living, the ALJ found that plaintiff had
11 only mild difficulties in this area. (AR 16, 19-20.) The ALJ noted plaintiff reported no
12 difficulties completing personal care and preparing meals for herself on a daily basis. (AR 16,
13 19, 218-19, 232-33, 283-84.) Plaintiff also reported that she takes care of pets and performs
14 household chores. *Id.* Plaintiff also testified that she “couch surfs” between her boyfriend’s
15 house and her parents’ house, and that when she stays with her parents she gets up early and
16 cleans their house in exchange for rent. (AR 20, 40, 282.)

17 Dr. Nelson also opined that plaintiff had marked difficulties maintaining social
18 functioning, but the ALJ found plaintiff had only moderate difficulties in this area. (AR 16,
19 19-20.) The ALJ noted plaintiff “testified to having a network of friends with whom she
20 maintains contact regularly, including going to the movies and sitting at the beach with them;
21 she goes on picnics with her boyfriend; she testified to using the computer to access the social
22 networking site Facebook; and although she tries to avoid crowds because of alleged anxiety,

01 this condition does not stop her from doing grocery shopping or going to the movies.” (AR 19,
02 20.)

03 Dr. Nelson also opined that plaintiff had marked deficiencies in concentration,
04 persistence, and pace, however, the ALJ found that plaintiff had only mild limitations in this
05 area. (AR 16, 18-19.) The ALJ noted that plaintiff dropped out of high school, but had
06 enough persistence to complete her GED through job corps and look for employment. (AR
07 18-19, 38-39.) The ALJ also noted that plaintiff engaged in vocational rehabilitation,
08 including taking career aptitude tests and researching careers in microbiology and technical
09 writing. (AR 19, 41.) The ALJ further found plaintiff retains enough attention and
10 concentration to play the online game “mobsters.” (AR 20, 41.)

11 The ALJ was permitted to discount Dr. Nelson’s opinions because they were
12 inconsistent with plaintiff’s own testimony as well as her reported activities of daily living.
13 *See Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir. 2001) (holding the ALJ’s finding that the
14 treating doctor’s “restrictions appeared to be inconsistent with the level of activity that
15 [plaintiff] engaged in by maintaining a household and raising two young children,” was a
16 specific and legitimate reason for discounting the opinion); *Morgan v. Comm’r of Soc. Sec.*
17 *Admin.*, 169 F.3d 595, 601-02 (9th Cir. 1999) (finding the ALJ permissibly rejected treating
18 physician’s opinion that conflicted with plaintiff’s daily activities); *see also Fisher v. Astrue*,
19 429 Fed. App’x 649, *652, 2011 WL 1575449 (9th Cir. 2011) (finding inconsistencies between
20 doctor’s opinions and plaintiff’s activities were specific and legitimate reasons to discount the
21 doctor’s opinion). Plaintiff objects to the ALJ’s reliance on some of her statements, arguing
22 that a significant portion of her statements of activities were from a 2006 disability function

01 report, which was more than three years before her current alleged onset date. Although some
02 of the activities the ALJ cited were from a 2006 function report, plaintiff made the same or
03 substantially similar statements in her March 2009 and August 2009 function reports as well as
04 in her testimony at the hearing. *Compare* AR 218-19 *with* AR 38-41, 232-33, 282-84. The
05 ALJ did not err in relying, in part, on her 2006 statements.

06 Second, the ALJ rejected Dr. Nelson's opinion that plaintiff has recurrent severe panic
07 attacks, stating that treatment records do not support allegations that she has panic attacks that
08 are either recurrent or severe. (AR 19.) The ALJ noted that Dr. Nelson based his opinion on a
09 mental status examination, however, the ALJ found "no indication that Dr. Nelson performed
10 any status exam, and the claimant's score at a mental status exam performed by Dr. Hofman on
11 October 25, 2008, was 29 out of 30, a high score that does not justify Dr. Nelson's low
12 functional assessment." *Id.* The ALJ also noted that plaintiff testified to having panic attacks
13 that last only 20-30 minutes. *Id.*

14 Plaintiff argues, and the Court agrees, that the ALJ failed to give any legitimate
15 rationale for rejecting Dr. Nelson's opinions that plaintiff suffers from recurrent severe panic
16 attacks or a panic disorder. Contrary to the ALJ's assertion, Dr. Nelson's treatment records
17 show that he diagnosed plaintiff with panic disorder and prescribed medication to help treat her
18 panic attacks. (AR 437, 450, 451, 516, 529, 535, 546, 547, 554, 555.) In addition, Dr. Nelson
19 performed at least seven mental status examinations and documented his observations and
20 diagnoses. (AR 450-51, 455, 515-16, 528-29, 534-35, 546-47, 554-55.) Furthermore, the
21 fact that plaintiff testified that she has panic attacks once a week that last for 20 to 30 minutes
22 does not conflict with Dr. Nelson's opinion that plaintiff has recurrent, severe panic attacks.

01 (AR 54.)

02 The Commissioner concedes that the ALJ was mistaken when he stated that Dr. Nelson
03 had not performed any mental status examinations. (Dkt. No. 20 at 17.) However, the
04 Commissioner argues that any error is harmless because plaintiff did not meet her burden of
05 showing that the ALJ's error prejudiced her, asserting that "Dr. Nelson's mental status
06 examinations only described a person without disability." *Id.* at 17-18. The Commissioner
07 contends that Dr. Nelson's mental status examinations "are consistent with Dr. Hofman's
08 mental status examination, which the ALJ found conflicted with Dr. Nelson's interrogatory
09 opinions." *Id.* at 17-18. Although the Commissioner offers several reasons that could justify
10 the ALJ's decision to reject Dr. Nelson's opinion, the fact remains these were not the reasons
11 cited by the ALJ. The Commissioner's post hoc rationalizations, even if correct, cannot cure
12 the ALJ's error. *Bray*, 554 F.3d at 1225 (counsel's post hoc rationalizations are not substituted
13 for the reasons supplied by the ALJ).

14 The Commissioner also contends that the ALJ accounted for plaintiff's panic attacks by
15 finding these attacks were consistent with plaintiff's severe acute stress disorder and by limiting
16 plaintiff to occasional contact with coworkers and incidental contact with the public in his RFC
17 assessment. (Dkt. No. 20 at 19.) The Commissioner's argument is unpersuasive. The ALJ
18 clearly did not believe Dr. Nelson's opinion that plaintiff suffered from recurrent severe panic
19 attacks, yet, as indicated above, the ALJ failed to provide specific and legitimate reasons for
20 disregarding Dr. Nelson's diagnosis of panic disorder. (AR 19.) The Court is not permitted
21 to accept the Commissioner's post hoc rationalization in this regard.

22 In sum, the ALJ erred by failing to provide specific and legitimate reasons for rejecting

01 Dr. Nelson's opinion that plaintiff suffers from a severe panic disorder. In addition, the ALJ
02 provided no reasons for disregarding Dr. Nelson's opinion that plaintiff suffers from ADHD.
03 (AR 451, 455, 491, 516, 529, 535, 547, 555.) These errors are not harmless because the ALJ
04 failed to consider these impairments in combination with her other impairments at steps two
05 and three, as well as at subsequent steps in the sequential evaluation process. Thus, remand is
06 warranted for the ALJ to properly consider Dr. Nelson's opinions regarding the severity of
07 plaintiff's panic disorder and ADHD on her functioning.

08 C. State Agency Physicians

09 Plaintiff also argues that the ALJ erred in giving greater weight to the opinions of the
10 unidentified, nonexamining state agency consultants than to the treating and examining doctors
11 in this case. (Dkt. No. 16 at 14-18.) "The opinion of a nonexamining physician cannot by
12 itself constitute substantial evidence that justifies the rejection of the opinion of either an
13 examining physician or a treating physician." *Lester*, 81 F.3d at 831; *Pitzer v. Sullivan*, 908
14 F.2d 502, 506 n. 4 (9th Cir. 1990); *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984).
15 As discussed above, because the ALJ did not properly evaluate the opinions of Dr. Hofman and
16 Dr. Nelson, the Court concludes that the ALJ did not set forth specific, legitimate reasons that
17 are supported by substantial evidence in the record for his decision to give greater weight to the
18 opinions of the nonexamining state agency consultants, while giving less weight to the opinions
19 of examining psychologist Dr. Hofman and treating psychiatrist Dr. Nelson. On remand, the
20 ALJ must reevaluate the opinions of the state agency consultants along with the opinions of Dr.
21 Hofman and Dr. Nelson.

22 Plaintiff also argues that the ALJ erred in failing to address the opinion of state agency

01 psychologist Faulder Colby, Ph.D., who completed a Certification for Medicaid on December
02 5, 2008. (Dkt. No. 16 at 8, 17-18.) Dr. Colby wrote: “Dr. Hofman’s Oct. ’08 evaluation
03 noted chronic depression and stress disorders. Cognition intact. Approve GAX under SSA
04 12.04, Affective Disorders.” (AR 483.) Plaintiff contends Dr. Colby’s decision supports a
05 finding that she meets the criteria for Listing 12.04 for affective disorders. (Dkt. No. 16 at
06 17-18.) The Commissioner argues that any error in failing to address Dr. Colby’s opinion was
07 harmless because Dr. Colby’s opinion was vague and was based entirely on his review of Dr.
08 Hofman’s evaluation, which was granted only “some weight” by the ALJ. (Dkt. No. 20 at 15.)
09 Because the ALJ failed to consider Dr. Colby’s opinion, and because the ALJ erred in
10 discounting Dr. Hofman’s opinion, on remand the ALJ should also discuss Dr. Colby’s opinion
11 and explain the weight given to it. *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995)
12 (quoting *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984) (the ALJ “may not reject
13 ‘significant probative evidence’ without explanation.”)).

14 Steps Two and Three

15 Plaintiff argues that the ALJ failed to properly consider all of her severe mental
16 impairments at step two and when he assessed plaintiff’s functional limitations at step three.
17 In light of the fact that the ALJ must reevaluate the opinions of Dr. Hofman, Dr. Nelson, Dr.
18 Colby, and the state agency doctors on remand, it is unnecessary to determine whether the ALJ
19 also erred in evaluating the doctors’ diagnoses of mental disorders at step two, as alleged by the
20 plaintiff. However, on remand, the ALJ is directed to apply the “special technique” at steps
21 two and three, and discuss all colorable mental impairments. *See* 20 C.F.R. § 416.920a. For
22 example, the ALJ should discuss whether Dr. Nelson’s diagnoses of panic disorder and ADHD,

01 constitute colorable mental impairments, and if so, evaluate them in compliance with the
02 applicable regulations.

03 Credibility

04 Plaintiff argues that the ALJ improperly evaluated her testimony about her symptoms
05 and limitations. (Dkt. No. 16 at 21.) The ALJ's credibility determination rested in large part
06 on his assessment of the medical evidence. The credibility of plaintiff's testimony should thus
07 be re-examined on remand, along with the ALJ's evaluation of the medical evidence regarding
08 plaintiff's psychological limitations.

09 Steps Four and Five

10 As discussed above, the Court has found that the ALJ erred in evaluating the medical
11 evidence, and that these errors also undermined the ALJ's credibility assessment. Following
12 remand, the ALJ should reevaluate the medical evidence and plaintiff's credibility, determine
13 plaintiff's RFC, and obtain vocational expert testimony at step five, if appropriate. Because
14 this case must be remanded based upon the issues discussed above, it is unnecessary to reach
15 plaintiff's other assignments of error.

16 Remand

17 The Court has discretion to remand for further proceedings or to award benefits.
18 *Marcia v. Sullivan*, 900 F.2d 172, 176 (9th Cir. 1990). The Court may remand for further
19 administrative proceedings if enhancement of the record would be useful. *See Harman v.*
20 *Apfel*, 211 F.3d 1172, 1178 (9th Cir. 1990). Or the Court may remand for an award of benefits
21 where "the record has been fully developed and further administrative proceedings would serve
22 no useful purpose." *McCartey v. Massanari*, 298 F. 3d 1072, 1076 (9th Cir. 2002) (citing

01 *Smolen*, 80 F.3d at 1292). This occurs when:

02 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
03 claimant's evidence; (2) there are no outstanding issues that must be resolved
04 before a determination of disability can be made; and (3) it is clear from the
record the ALJ would be required to find the claimant disabled if he considered
the claimant's evidence.

05 *Id.* at 1076-77.

06 Where the ALJ fails to provide adequate reasons for rejecting a treating or examining
07 physician's opinion, the Court may credit that opinion as a matter of law and remand for an
08 award of benefits. *See Lester*, 81 F.3d at 834. However, courts retain flexibility in applying
09 the credit as true theory. *Id.* Where it is not clear from the record that the ALJ would be
10 required to award benefits if the evidence were credited, the Court may remand for further
11 determinations. *Id.* Here, it is not clear from the record that the ALJ would be required to
12 find plaintiff disabled if the evidence described herein was properly considered.

13 Plaintiff argues that while Dr. Hofman opined that mental health intervention would
14 likely restore or substantially improve plaintiff's ability to work, he nevertheless opined that
15 she would be unable to maintain employment for a minimum of one year – even if she were to
16 receive treatment. (Dkt. No. 16 at 8 (citing AR 411-12).) Plaintiff asserts that Dr. Hofman's
17 opinion thus establishes that she is disabled for a closed period of at least one year, from
18 October 2008 to October 2009.

19 In this case, it is clear Dr. Hofman believes that unless plaintiff's mental symptoms are
20 reduced she is unable to work. (AR 411-12.) But it is unclear whether Dr. Hofman believes
21 plaintiff would remain impaired to the degree he assessed even if she were to receive treatment.
22 The doctor suggests that mental health treatment would likely restore plaintiff's ability to work.

01 Plaintiff's records show that she began mental health treatment after Dr. Hofman rendered his
02 October 2008 opinions. (AR 415-18, 421, 437-55, 512-82.) Based on this record, the Court
03 cannot say Dr. Hofman's opinions establish as a matter of law that plaintiff would be disabled
04 for a closed period of at least one year from October 2008 to October 2009. The Court thus
05 concludes it would be appropriate to remand the case for further administrative proceedings.

06 IV. CONCLUSION

07 For the foregoing reasons, the Court recommends that the Commissioner's decision be
08 REVERSED and REMANDED for further administrative proceedings. On remand, the ALJ
09 should (1) reevaluate the medical evidence, including the opinions of Dr. Hofman, Dr. Nelson,
10 Dr. Colby, and the state agency doctors; (2) develop the medical record as necessary; (3)
11 reassess steps two and three of the sequential evaluation process; (4) reevaluate plaintiff's
12 credibility; (5) reassess plaintiff's RFC; and (6) reassess steps four and five of the sequential
13 evaluation process with the assistance of a vocational expert.

14 DATED this 24th day of April, 2013.

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16 Mary Alice Theiler
17 United States Magistrate Judge
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